Supreme Court, U.S.
FILED

97 1243 JAN 28 1998

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C.
AND
NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1309

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DAVID M. SMITH*
Solicitor

JAMES F. BLANDFORD
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424-0001
(202) 482-6620

**Counsel of Record*

RECEIVED
HAND DELIVERED

JAN 28 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

Whether the duty to bargain over matters that are not inconsistent with Federal law or Government-wide regulation, requires an agency employer to bargain over a proposal that would create a contractual obligation to negotiate over union-initiated proposals offered during the term of a collective bargaining agreement.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT	2
A. The Federal Service Labor-Management Relations Statute	2
B. The Instant Case	4
1. Factual Background	4
2. Relevant Judicial and Administrative Precedent	5
a. The D.C. Circuit's Decision in *NTEU* v. *FLRA*	5
b. The Fourth Circuit's Decision in *SSA* v. *FLRA*	7
c. The Fourth Circuit's Decision in *Energy* v. *FLRA*	8
3. The Decision of the Court of Appeals in the Instant Case	10
REASONS FOR GRANTING THE PETITION	11

A. The Decision of the Court Below Conflicts with that of the District of Columbia Circuit 11

1. The Conflict is Direct 11

2. The Conflict Must Be Resolved 12

B. The Court of Appeals Erroneously Determined that an Agency Is Not Obligated to Bargain over a Proposal Permitting Union-Initiated Midterm Bargaining 14

1. The Union's Proposal Is Negotiable because It Restates a Statutory Obligation 14

2. Even if there is No Statutory Obligation to Bargain Midterm, a Contract Provision Providing for Midterm Bargaining Is Within an Agency's Obligation to Bargain because It Is Not Inconsistent with Applicable Law, Rule, or Regulation 19

a. The Obligation to Bargain Is Not Delimited by the Rights granted by the Statute 20

b. Union-Initiated Midterm Bargaining Is Not Inconsistent with the Statute or Any Other Law or Applicable Regulation 20

CONCLUSION 26

APPENDIX A 1a

APPENDIX B 13a

APPENDIX C 27a

TABLE OF AUTHORITIES

Cases:

AFGE, Interdepartmental Local 3723, AFL-CIO, 9 FLRA 744 (1982), aff'd 712 F.2d 640 (D.C. Cir. 1983) 17

AFGE, Local 1698 and U.S. Dep't of the Navy, Naval Aviation Supply Office, Philadelphia, Pa., 38 FLRA 1016 (1990) 22

Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 45 FLRA 1290 (1992) 7

American Fed'n of Gov't Employees v. *FLRA*, 778 F.2d 850 (D.C. Cir. 1985) 4

Bureau of Alcohol, Tobacco and Firearms v. *FLRA*, 464 U.S. 89 (1983) 2, 3, 19, 20

Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ... 18

Council of Prison Locals v. *Brewer*, 735 F.2d 1497 (D.C. Cir. 1984) 4, 23

Department of Defense, Office of Dependents Schools v. *FLRA*, 879 F.2d 1220 (4th Cir. 1989) 23

Department of Defense v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) 3

Case—Continued

Department of Energy v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997) ..... *passim*

Department of Health and Human Services, Social Security Admin., Office of Hearings and Appeals, Falls Church, Va. and National Treasury Employees Union, 94 FSIP 47 (Aug. 3, 1994) 24

Department of the Treasury, U.S. Customs Serv. v. *FLRA*, 836 F.2d 1381 (D.C. Cir. 1988) 25

FLRA v. *Internal Revenue Serv.*, 838 F.2d 567 (D.C. Cir. 1988) ..... *passim*

FLRA v. *Social Security Admin.*, 846 F.2d 1475 (D.C. Cir. 1988) 16

Federal Employees Metal Trade Council, AFL-CIO v. *FLRA*, 778 F.2d 1429 (9th Cir. 1985) 22

Federal/Postal/Retiree Coalition v. *Devine*, 751 F.2d 1424 (D.C. Cir. 1985) 2

Fort Stewart Schools v. *FLRA*, 495 U.S. 641 (1990) 18

Garner v. *Teamsters Local Union No. 776*, 346 U.S. 485 (1953) 13

IFPTE, Local 128 and U.S. Department of the Interior, Bureau of Reclamation, 39 FLRA 1500 (1991) 12

Jacobs Mfg. Co., 94 NLRB 1214 (1951) *enforced* 196 F.2d 680 (2d Cir. 1952) 6

Internal Revenue Serv., 17 FLRA 731 (1985) 6

Case—Continued

Internal Revenue Serv., 29 FLRA 162 (1987) 6, 7, 17

Library of Congress v. *FLRA*, 699 F.2d 1280 (D.C. Cir. 1983) 14, 16

Merit Sys. Protection Bd. Prof'l Ass'n and Merit Sys. Protection Bd., Washington, D.C., 30 FLRA 852 (1988) 9

Mead Corp. v. *NLRB*, 697 F.2d 1013 (11th Cir. 1983) 15

Missouri National Guard, Office of the Adjutant Gen., Jefferson City, Missouri, 31 FLRA 1244 (1988) 7

NL Industries v. *NLRB*, 536 F.2d 786 (8th Cir. 1976) 15

NLRB v. *Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952) 15

NTEU v. *FLRA*, 826 F.2d 114 (D.C. Cir. 1987) 22

National Fed. of Fed. Employees, Local 2099 and Dep't of the Navy, Naval Plant Representative Office, St. Louis, Mo., 35 FLRA 362 (1990) 25

National Treasury Employees Union and Dep't of the Treasury, U.S. Customs Service, 21 FLRA 6 (1986), *enforced*, 836 F.2d 1381 (D.C. Cir. 1988) 20

National Treasury Employees Union Chapter 83 and Department of the Treasury, Internal Revenue Serv., 35 FLRA 398 (1990) 23

National Treasury Employees Union v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) ..... *passim*

Nuclear Regulatory Commission v. *FLRA*, 895 F.2d 152 (4th Cir. 1990) 14

Social Security Admin. v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) ..... *passim*

U. S. Department of Energy, Washington, D.C., 51 FLRA 124 (1995) 8, 15

U. S. Dept. of Health and Human Serv., Social Sec. Admin., Baltimore, Md., 47 FLRA 1004 (1993) 17

U. S. Patent and Trademark Office, 45 FLRA 1090 (1992), *rev'd*, 991 F.2d 790 (4th Cir. 1993) 7

Veterans Admin. Medical Center, Tampa, Florida v. *FLRA*, 675 F.2d 260 (11th Cir. 1982) 24

Statutes, rules, and regulations:

The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996) 2

5 U.S.C. 7101(a)(1) 22

5 U.S.C. 7101(b) 16

5 U.S.C. 7103(a)(12) 3

5 U.S.C. 7103(a)(14) 3

5 U.S.C. 7105(a)(1), (2) 2

5 U.S.C. 7106(a) 16

5 U.S.C. 7114(a)(1) 19

5 U.S.C. 7114(a)(4) 18

5 U.S.C. 7114(b)(1) 18

5 U.S.C. 7114(b)(2) 3

5 U.S.C. 7114(b)(5) 3, 18
5 U.S.C. 7114(c) 8
5 U.S.C. 7116 8
5 U.S.C. 7116(b)(7) 4
5 U.S.C. 7117(a) 14
5 U.S.C. 7117(c) 8
5 U.S.C. 7119(b)(1) 4
5 U.S.C. 7119(c) 4
5 U.S.C. 7119(c)(5)(A) 4
5 U.S.C. 7119(c)(5)(B) 4
5 U.S.C. 7119(c)(5)(C) 4
5 U.S.C. 7123(a) 3, 13
5 U.S.C. 7123(b) 3
28 U.S.C. 1254(1) 1
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) 2
Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.) 2
Executive Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.) 2

In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
WASHINGTON, D.C.
AND
NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 1309

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The judgment of the court of appeals (App., *infra.*, 1a-12a) is reported at — F.3d —. The decision and order of the Federal Labor Relations Authority (App., *infra.*, 13a-26a) is reported at 52 FLRA 475.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996) are reproduced in the appendix (App., *infra.*, 27a-37a).

STATEMENT

A. The Federal Service Labor-Management Relations Statute

The Federal Service Labor-Management Relations Statute ("the Statute") governs labor-management relations in the federal service.[1] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority") include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority performs a role analogous to that of the National Labor Relations Board ("NLRB") in the private sector. *See BATF*, 464 U.S. at 92-93; *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field

---

[1]The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

With exceptions not relevant here, any person, including a federal agency employer, who is aggrieved by a final order of the Authority may seek judicial review in the United States court of appeals "in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). The Authority may petition for enforcement of its orders in appropriate courts of appeals. *See* 5 U.S.C. 7123(b).

The instant case concerns the scope of an agency employer's obligation to bargain with the exclusive representative of its employees. Under the Statute, an agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment and, upon the request of either party, execute a document embodying the agreed upon terms. 5 U.S.C. 7103(a)(12), 7114(b)(2), 7114(b)(5). The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a "compelling need" exists. 5 U.S.C. 7117(a). The obligation to bargain in good faith under the Statute does not require the agency to agree to a proposal or to make a concession. 5 U.S.C. 7103(a)(12); *see Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

Where the collective bargaining process between an agency and a union fails to resolve an issue, the Statute

provides for resolution through the Federal Service Impasses Panel ("Panel").[2] 5 U.S.C. 7119(b); *see Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Council of Prison Locals*). The Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. 5 U.S.C. 7119(c). Either party may request the Panel to conduct an inquiry into a bargaining impasse. 5 U.S.C. 7119(b)(1). The Panel investigates the impasse and offers recommendations or assistance to resolve the deadlock. 5 U.S.C. 7119(c)(5)(A). If the parties still cannot reach a settlement, the Panel may hold hearings and take whatever action is necessary and not inconsistent with Chapter 71 of Title 5 of the United States Code to resolve the impasse. 5 U.S.C. 7119(c)(5)(B). When the Panel imposes a term on the parties, it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C). The Panel does not have authority to pass judgments on assertions of nonnegotiability. The resolution of negotiability issues are made by the Authority. *See American Fed'n of Gov't Employees* v. *FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985).

B. The Instant Case

1. Factual Background

This case is the most recent of a series of cases decided by the Authority and the courts of appeals concerning the extent of a federal agency employer's obligation to negotiate over union-initiated proposals offered during the term of a collective bargaining agreement. The National Federation of Federal Employees, Local 1309

---

[2]Strikes in the federal sector are forbidden under 5 U.S.C. 7116(b)(7).

("NFFE" or "union") is the exclusive bargaining representative for a unit of employees at the U.S. Geological Survey, Reston, Virginia, ("Survey"), an activity of the United States Department of the Interior (App., *infra.*, 22a). During negotiations of a collective bargaining agreement, the union offered the following proposal:

> Article 7. Section 2.b. Union-initiated Bargaining. The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

(App., *infra.*, 14a). The Survey refused to negotiate over the proposal, contending that the proposal was not within its statutory duty to bargain (App., *infra.*, 15a).

In response, NFFE filed an unfair labor practice charge with the Authority. As relevant here, the Authority held that the proposal was within the Survey's obligation to bargain and that the Survey committed unfair labor practices when it refused to bargain (App., *infra.*, 19a-21a). On review, the Fourth Circuit reversed the Authority, finding that union-initiated bargaining during the term of a collective agreement is "contrary to the Statute" (App., *infra.*, 7a).

The Fourth Circuit's decision was written against an extensive background of conflicting administrative and judicial precedent. Because the court's decision can only be understood in this context, a history of the relevant precedent is provided prior to analyzing the court's opinion in the instant case.

2. Relevant Judicial and Administrative Precedent

a. The D.C. Circuit's Decision in *NTEU* v. *FLRA*

The Authority first considered an agency's obligation to bargain over union-initiated midterm proposals in

Internal Revenue Serv., 17 FLRA 731 (1985) (*IRS I*). There the Authority determined that Congress intended to limit the obligation to bargain over union-initiated proposals to situations where the parties were negotiating a basic collective bargaining agreement. *Id.* at 735-36.

On review, the D.C. Circuit set aside the Authority's decision and remanded the case to the Authority. *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU* v. *FLRA*). Relying on private sector precedent and congressional intent to encourage and promote collective bargaining in the federal sector, the court held that the obligation to bargain under the Statute extends to union-initiated midterm proposals. *Id.* at 301. The court found that the Statute does not distinguish midterm bargaining from any other type of bargaining in terms of the mutual obligation to negotiate in good faith. *Id.* Further, the court stated that, when enacting the Statute, Congress was aware of "clear and long-established [private sector] precedent that the duty to bargain extends also to midterm proposals initiated by either management or labor, provided the proposals do not conflict with the existing agreement." *Id.* at 299 (citing *Jacobs Mfg. Co.*, 94 NLRB 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952)).

On remand, the Authority adopted the reasoning of the D.C. Circuit and held that an agency is obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters not contained in or covered by the term agreement unless the union has waived its right to bargain about the subject matter involved. *Internal Revenue Serv.*, 29 FLRA 162, 166 (1987) (*IRS II*). The D.C. Circuit subsequently denied a suggestion for initial hearing *in banc* filed by the Internal Revenue Service after the Author-

ity sought enforcement of its order in *IRS II*. *FLRA* v. *Internal Revenue Serv.*, 838 F.2d 567 (D.C. Cir. 1988). In a concurring opinion to the denial, Edwards, J., joined by Silberman, J., endorsed the Authority's conclusions and rationale concerning the right to engage in midterm bargaining, specifically stating that the Authority properly applied private sector precedent. *Id.* at 568-69.

b. The Fourth Circuit's Decision in *SSA* v. *FLRA*

After *IRS II*, the Authority continued to hold that agency employers are obligated to bargain over union-initiated midterm proposals. *See, e.g., Missouri National Guard, Office of the Adjutant Gen., Jefferson City, Missouri*, 31 FLRA 1244 (1988). However, the Authority's construction of this aspect of the Statute was challenged in the Fourth Circuit in *Social Security Admin.* v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA* v. *FLRA*). The Fourth Circuit expressly disagreed with the reasoning of the Authority and the D.C. Circuit, concluding that "union-initiated midterm bargaining is not required by the [S]tatute and would undermine the congressional policies underlying the [S]tatute." *Id.* at 1281. First, the Fourth Circuit found that reliance on private sector precedent was inappropriate in this context. *Id.* at 1286-88. Second, the court held that midterm bargaining undermined the Statute's goal of promoting an effective and efficient Government. *Id.* at 1288-90.

Despite the Fourth Circuit's decision, the Authority adhered to its view expressed in *IRS II* that the duty to bargain extends to union-initiated midterm proposals. *See, e.g., Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 45 FLRA 1290 (1992); *U. S. Patent and Trademark Office*, 45 FLRA 1090 (1992), *rev'd*, 991 F.2d 790 (4th Cir. 1993) (Table).

c. The Fourth Circuit's Decision in *Energy* v. *FLRA*

In *U. S. Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995) (*Department of Energy*), the Authority, and in turn the Fourth Circuit, were presented with the issue of midterm bargaining in a new context. In resolving a bargaining impasse, the Panel imposed the following provision in a contract between a subordinate activity of the Department of Energy and the exclusive representative of the activity's employees:

> The Employer will be obligated to bargain in good faith on any negotiable Union-initiated proposals concerning matters that are not contained in or covered by the collective-bargaining agreement, unless the Union has waived its right to bargain about the subject matter involved.

51 FLRA at 125. On review of the contract, the Department of Energy disapproved the provision as being contrary to law, citing *SSA* v. *FLRA*. *Id.* The union filed an unfair labor practice charge with the Authority, contending the agency's disapproval was improper.[3] *Id.* at 124.

On alternative grounds, the Authority rejected the Department of Energy's assertion that, under the authority of *SSA* v. *FLRA*, the disputed provision was contrary to law. *Id.* at 127-28. First, the Authority found that *SSA* v. *FLRA* addressed only whether, apart from any contractual obligation, an agency is mandated

---

[3]Under section 7114(c) of the Statute, the agency head may review a collective bargaining agreement to assure that its provisions are consistent with applicable law, rule, or regulation. 5 U.S.C. 7114(c). A union may contest an agency head's disapproval as a negotiability appeal under section 7117(c) of the Statute or as an unfair labor practice under section 7116(a). 5 U.S.C. 7116(a), 7117(c).

under the Statute to engage in midterm bargaining. *Id.* at 127. *SSA* v. *FLRA* did not address the negotiability of a contract provision for union-initiated midterm bargaining. Thus, in the Authority's view, *SSA* v. *FLRA* did not compel a finding that the contractual provision was inconsistent with law. *Id.* at 127-28. The Authority then concluded that the provision was not inconsistent with any provision of applicable law, rule, or regulation. *Id.* at 129.

Alternatively, the Authority noted that it has respectfully declined to follow the Fourth Circuit's *SSA* v. *FLRA* decision and has continued to hold that agencies are required under the Statute to engage in midterm bargaining over union-initiated proposals. *Id.* at 127 n.4. Accordingly, the Authority found that although the negotiability of the provision did not depend on finding a statutory obligation to bargain midterm, the proposal did restate the statutory obligation and was negotiable on that ground as well. *Id.* at 128 n.5 (citing *Merit Sys. Protection Bd. Prof'l Ass'n and Merit Sys. Protection Bd., Washington, D.C.*, 30 FLRA 852, 859-60 (1988)).

The Fourth Circuit granted the Department of Energy's petition for review and reversed the Authority's decision. *Department of Energy* v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997) (*Energy* v. *FLRA*). Although recognizing that the question of whether the Statute imposes a duty differs from the question of whether an agency must bargain regarding a clause in a collective bargaining agreement, the court found that midterm bargaining is inconsistent with the Statute because it was "at odds with the policies underlying [the Statute] and is wholly contrary to congressional intent." *Id.* at 1164. The court further held that finding the provision at issue negotiable "would effectively vitiate [*SSA* v. *FLRA*]." *Id.* at 1163. The court reasoned that because the Panel

adheres to the Authority's interpretation of the Statute concerning the obligation to bargain midterm, it would be unlikely that the Panel would ever fail to impose a midterm bargaining provision on an agency. *Id.* at 1163-64. Thus, the court concluded, "a union could circumvent [*SSA* v. *FLRA*] by the mere expedient of negotiating to impasse on a midterm bargaining provision." *Id.* at 1164.

3. The Decision of the Court of Appeals in the Instant Case

While *Energy* v. *FLRA* was pending before the Fourth Circuit, but before the case was decided, the Authority issued its decision and order in the instant case (App., *infra.*, 13a-26a). As noted above (p. 5, *supra*), the agency employer here had refused to bargain over a proposal substantially identical to that at issue in *Department of Energy*. Expressly relying on *Department of Energy*, the Authority found that the proposal was consistent with law and within the agency's obligation to bargain (App., *infra.*, 19a-21a). Accordingly, the Authority found that the refusal to bargain was an unfair labor practice (App., *infra.*, 23a).

The Department of the Interior petitioned the Fourth Circuit for review. Finding the case controlled by *SSA* v. *FLRA* and *Energy* v. *FLRA*, the court granted the petition for review and denied the Authority's cross-application for enforcement (App., *infra.*, 12a). The court found no meaningful distinction between the legality of a midterm bargaining requirement imposed by the Panel as in *Energy* v. *FLRA*, and an agency's obligation to negotiate over a requirement to bargain midterm (App., *infra.*, 9a-11a). Accordingly, the court found the union's proposal nonnegotiable (App., *infra.*, 11a). In so concluding, the court recognized "the difficulties the conflicting decisions present," but noted that "the recourse for resolution must be sought elsewhere" (App., *infra.*, 11a).

REASONS FOR GRANTING THE PETITION

This case presents a recurring and significant issue on which there is an acknowledged conflict in the circuits. Continuation of this conflict creates uncertainty among federal employers and the unions which represent their employees with respect to the extent and nature of the obligation of employers to bargain over union-initiated midterm proposals. In this regard, the court of appeals in this case erroneously held there can be no obligation to bargain midterm, whether statutory or contractual.

A. The Decision of the Court Below Conflicts with that of the District of Columbia Circuit

1. The Conflict Is Direct

The decision of the court of appeals is in direct conflict with the D.C. Circuit's decision in *NTEU* v. *FLRA*. In the instant case the court of appeals held that "a [contract] clause requiring an agency to engage in union-initiated midterm bargaining is inconsistent with [the Statute]" (App., *infra*., 11a). In stark contrast, the D.C. Circuit found that midterm bargaining is not only consistent with the Statute, but that under the Statute an agency is obligated to bargain over union-initiated midterm proposals. *NTEU* v. *FLRA*, 810 F.2d at 301; *see also FLRA* v. *IRS*, 838 F.2d at 568.

Although the precise question decided by the court of appeals in the instant case is different than that decided by the D.C. Circuit, the conflict is nonetheless direct. Here the question is whether a collective bargaining proposal which would require the agency to bargain over union-initiated proposals during the term of the agreement is consistent with applicable law. In *NTEU* v. *FLRA*, the D.C. Circuit determined that the Statute itself required that an agency bargain over union initi-

ated midterm proposals. 810 F.2d at 301. The conflict is present for two related reasons.

First, although the D.C. Circuit has never addressed the question of whether midterm bargaining is negotiable, *i.e.*, whether a contract provision requiring midterm bargaining is consistent with law, an affirmative answer to that question can be inferred from its *NTEU* v. *FLRA* decision. If, as the D.C. Circuit held, midterm bargaining is mandated by the Statute, it necessarily follows that midterm bargaining is consistent with the Statute. *See IFPTE, Local 128 and U.S. Dep't of the Interior, Bureau of Reclamation*, 39 FLRA 1500, 1503-04 (1991) (proposal which restates statutory obligation is negotiable).

Second, the Fourth Circuit and the D.C. Circuit have both specifically addressed the question of whether the Statute *requires* midterm bargaining and, as the Fourth Circuit expressly acknowledged, are in "clear conflict on the issue" (App., *infra.*, 5a). In *SSA* v. *FLRA*, the Fourth Circuit expressly rejected the reasoning of the D.C. Circuit and found that an agency is not obligated under the Statute to bargain over union-initiated midterm proposals. 956 F.2d at 1289-90. It was wholly on the basis of the reasoning of *SSA* v. *FLRA* that the court of appeals decided, in the instant case, that a contract proposal providing for midterm bargaining is nonnegotiable. Thus, the grounds upon which the instant case is based are in conflict with the law of the D.C. Circuit.

In sum, the Fourth Circuit has concluded that an agency may not do what the D.C. Circuit concludes it is statutorily obligated to do.

2. The Conflict Must Be Resolved

As the court of appeals recognized, the conflicting holdings of the Fourth and D.C. Circuits create signifi-

cant difficulties. First, there is a need for uniformity in construing federal law that regulates federal sector labor-management relations. The Supreme Court has recognized that Congress, in regulating private sector labor-management relations, intended that there be uniform application of statutory rules and procedures. *See Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953).

Further, continuation of this conflict will necessarily proliferate litigation and uncertainty within the federal sector labor relations community, and thereby drain resources of federal agency employers and the unions that represent federal employees, as well as burden the FLRA and the courts. These difficulties are in large measure due to the uncertain venue provisions of the Statute. Under section 7123(a), a person aggrieved by a final order of the Authority may "institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). Accordingly, in any case arising outside the geographical jurisdiction of the D.C. Circuit, there will be at least two available venues for resolution of a labor dispute.

When, as here, an agency's offices are located within the geographical jurisdiction of the Fourth Circuit, both the Fourth and D.C. Circuits are potential available venues for judicial determinations. Employees of such agencies will be unsure of their rights and obligations with respect to midterm bargaining knowing that any decision of the Authority will be inconsistent with the precedent of a potential reviewing court.

B. The Court of Appeals Erroneously Determined that an Agency Is Not Obligated to Bargain over a Proposal Permitting Union-Initiated Midterm Bargaining

Under section 7117(a) of the Statute, an agency employer is obligated to bargain over all conditions of employment unless the bargaining proposal is inconsistent with law, a Government-wide regulation, or an agency regulation for which a compelling need exists. 5 U.S.C. 7117(a). The courts of appeals, including the Fourth Circuit, have recognized that the Statute imposes a "broadly defined and expansive duty to bargain that is subject only to the express statutory exceptions." *Nuclear Regulatory Comm'n* v. *FLRA*, 895 F.2d 152, 154 (4th Cir. 1990); *see Library of Congress* v. *FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983) (*Library of Congress*).

Here, the court of appeals held that there is no obligation to negotiate over a contractual provision requiring the agency to bargain midterm over union-initiated proposals concerning matters not contained in or covered by the term agreement. There are two reasons why the decision of the Fourth Circuit is incorrect. First, the proposal merely restates an agency's statutory obligation. Second, the proposal does not fall within an express statutory exception to the bargaining obligation, *i.e.*, it is not inconsistent with any law, Government-wide regulation or agency regulation for which a compelling need exists.

1. The Union's Proposal Is Negotiable because It Restates a Statutory Obligation

In the administrative decision below, the Authority reiterated its adherence to its determination in *IRS II* that an agency is required under the Statute to bargain

over union-initiated midterm proposals (App., *infra*, 19a). In *Department of Energy*, whose reasoning the Authority incorporated in the instant case, the Authority found that a contract clause providing for midterm bargaining was within the agency's obligation to bargain because it simply restated a statutory obligation. 51 FLRA at 128 n.5. The Fourth Circuit, however, has previously held that there is no obligation under the Statute to bargain over union-initiated midterm proposals. *SSA* v. *FLRA*, 956 F.2d at 1281.[4] For the reasons below, however, the court of appeals' conclusion in this regard is mistaken.

a. First, the court of appeals improperly rejected as "inappropriate" (956 F.2d at 1287) the Authority's reliance on private sector precedent under which unions have the right to make midterm bargaining demands concerning negotiable subjects unless the parties' agreement covers such matters or the union clearly and unmistakably waived the right to insist on such negotiations. *See NLRB* v. *Jacobs Mfg. Co.*, 196 F.2d 680, 684 (2d Cir. 1952); *Mead Corp.* v. *NLRB*, 697 F.2d 1013, 1020 (11th Cir. 1983); *NL Industries* v. *NLRB*, 536 F.2d 786, 789-90 (8th Cir. 1976). Although "the relevance or applicability of private sector labor law to the law of the public sector may vary with the specific issues raised"

---

[4]Because the court had previously held that there was no statutory duty to bargain midterm, the Authority did not argue in the instant case or in *Energy* v. *FLRA* that the union's proposal for midterm bargaining was negotiable because it restated a statutory obligation. Instead the Authority pressed only its alternative argument that, apart from any statutory duty to bargain midterm, a contract provision requiring midterm bargaining is not inconsistent with either applicable law or regulation. Nonetheless, the existence of a statutory obligation, which remains a ground for the Authority's decision, was necessarily rejected by the court of appeals.

(*Library of Congress*, 699 F.2d at 1287), there are "no practical distinctions between private and governmental needs as to midterm bargaining." *NTEU* v. *FLRA*, 810 F.2d at 300. In such a case, application of private sector precedent is wholly appropriate. *See FLRA* v. *Social Security Admin.*, 846 F.2d 1475, 1478 (D.C. Cir. 1988) (court applied private sector principles where "no unique public sector concerns" exist, noting that the Statute was modeled after National Labor Relations Act and its provisions were crafted either by analogy or contrast).[5]

b. The court of appeals also suggested that midterm bargaining would be potentially harmful to effective and efficient government (citing section 7101(b) of the Statute), and thus run afoul of the Statute. *SSA* v. *FLRA*, 956 F.2d at 1288. But Congress declared in section 7101(a)(1) of the Statute that collective bargaining is in the public interest and contributes to the effective conduct of public business. Conversely, allowing serious and unanticipated workplace problems to go unaddressed until the next round of scheduled negotiations—perhaps three years hence for a basic agreement of that duration—could well contribute to instability and decrease employee productivity.

---

[5]A principal difference between private sector and federal sector labor law are the matters subject to collective bargaining. Because many conditions of employment are determined by law and regulation, and because section 7106(a) (5 U.S.C. 7106(a)) of the Statute expressly reserves a number of matters to management discretion, the scope of bargaining under the Statute is narrower than in the private sector. This, however, says nothing about the timing of negotiations. As the D.C. Circuit observed in *NTEU* v. *FLRA*, 810 F.2d at 301, the two—timing and scope—are distinct. Moreover, it is reasonable to assume that Congress intended to protect governmental interests by narrowing the scope of bargaining rather than by restricting the timing of negotiations.

Further, the court of appeals has exaggerated the deleterious effects of union-initiated midterm bargaining. The court suggested that such bargaining "risks serious interference" with effective and efficient government because it would encourage dispersal of the bargaining process and result in "seriatim midterm bargaining . . . over individual issues raised midterm." *Id.* These concerns are unfounded.

First, the statutory right found by the Authority, as well as the contract provisions at issue in the instant case and in *Energy* v. *FLRA*, permits midterm bargaining only over matters not contained in or covered by the term agreement or otherwise waived in the bargaining process. *See FLRA* v. *IRS*, 838 F.2d at 568-69. Excluded from midterm bargaining would be not only matters explicitly addressed in the term agreement but also those matters commonly thought to be an aspect of a matter expressly covered by the agreement. *See U.S. Dep't of Health and Human Serv., Social Sec. Admin., Baltimore, Md.*, 47 FLRA 1004, 1018 (1993). Further, any matter fully explored and discussed during term negotiations would be removed from the scope of allowable midterm bargaining. *See IRS II*, 29 FLRA 162, 167 (1987). Second, contrary to the court's suggestion the union does not have the ability to either limit or control the scope of negotiations. Management negotiators have the right to raise any and all negotiable issues at term bargaining and insist on pursuing the matter to impasse. *See AFGE, Interdepartmental Local 3723, AFL-CIO*, 9 FLRA 744, 754-55 (1982), *aff'd* 712 F.2d 640 (D.C. Cir. 1983) (union commits unfair labor practice when it refuses to bargain over mandatory subject of bargaining). If either party refuses to agree to include a negotiable matter in the collective bargaining agreement, as in this case, the services of the Panel can be

invoked to resolve the impasse. Third, as was recognized in *FLRA* v. *Internal Revenue Service*, agencies are free to negotiate "zipper" clauses or other provisions restricting negotiations on particular issues. 838 F.2d at 569.[6]

c. Finally, the court of appeals has failed to give the Authority the deference due under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*); *see also Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 645 (1990) (Authority decisions are reviewed under *Chevron* standard). Under *Chevron*, if "the statute is silent or ambiguous" on the point at issue, then the interpretation of the agency charged with implementing the statute is to be upheld if it is a permissible construction. 467 U.S. at 843. In *SSA* v. *FLRA* the court of appeals conceded that a "textual analysis [of the Statute] is not definitive in this case, for the [Statute] does not explicitly discuss union-initiated midterm bargaining." 956 F.2d at 1284; *see also NTEU* v. *FLRA*, 810 F.2d at 298 (text of the Statute "neither specifies nor distinguishes midterm bargaining, union-initiated midterm bargaining, and any other type of bargaining").

The court nonetheless concluded from "suggestions" in the statutory language that Congress "appears" to have excluded the possibility of union-initiated midterm bargaining. 956 F.2d at 1284. The court relied upon phrases in section 7114(a)(4), (b)(1), and (b)(5) of the

---

[6]The Fourth Circuit suggested that "zipper clauses" are not an adequate solution to the "problem" because the Authority had not declared them to be mandatory bargaining subjects. 956 F.2d at 1288. Although the Authority has not had the opportunity to address this issue, the District of Columbia Circuit has opined that, just as in the private sector, zipper clauses would be mandatory subjects of negotiation in the federal sector. *FLRA* v. *Internal Revenue Serv.*, 838 F.2d at 570.

Statute which speak of the duty to bargain in the singular terms of reaching "a collective bargaining agreement" and implementing "such agreement," but ignored other provisions of the Statute which directly concern the duty to bargain and use the plural "agreements." *Id.* at 1284-85; *see, e.g.*, 5 U.S.C. 7114(a)(1) (exclusive representative "is entitled to . . . negotiate collective bargaining *agreements* covering . . . all employees in the unit" (emphasis added).[7]

Because both the Statute's language and its legislative history are either silent or ambiguous concerning the issue of midterm bargaining, the Authority's statutory construction concerning when the duty to bargain arises—an issue which goes to the very heart of the special function Congress entrusted to it—is entitled to "considerable deference." *BATF*, 464 U.S. at 103.

2. Even if there is No Statutory Obligation to Bargain Midterm, a Contract Provision Providing for Midterm Bargaining Is Within an Agency's Obligation to Bargain because It Is Not Inconsistent with Applicable Law, Rule, or Regulation.

Even if the court of appeals is correct in holding that the Statute does not require an agency to bargain over union-initiated midterm proposals, it erred in holding that a union cannot acquire the right through the bargaining process itself.

---

[7]The Fourth Circuit's reliance on the Statute's legislative history is similarly unavailing. *See SSA* v. *FLRA*, 956 F.2d at 1284-85. The brief passage relied upon is from the Senate report which accompanied a bill that was not enacted, and which had a far narrower view of the mutual obligation to bargain than the House bill which became law. *See NTEU* v. *FLRA*, 810 F.2d at 299. Moreover, as the D.C. Circuit found the passage itself was "ambiguous." *Id.*

a. The Obligation to Bargain Is Not Delimited by the Rights Granted under the Statute

It is well established that an agency may be obligated to bargain over matters beyond those guaranteed by the Statute. Indeed, were the universe of bargainable matters limited to preexisting statutory entitlements, the right to engage in collective bargaining under the Statute would be rendered meaningless.

That a union may bargain for rights in excess of those provided by law has also been recognized by this Court. In finding that the Statute did not entitle union negotiators to travel and per diem payments, the Court stated that "unions may presumably negotiate for such payments in collective bargaining." *BATF*, 464 U.S. at 107 n.17. Subsequent to *BATF*, the Authority found travel and per diem for union negotiators to be negotiable because it was not inconsistent with applicable law or regulation. *See National Treasury Employees Union and Dep't of the Treasury, U.S. Customs Serv.*, 21 FLRA 6, 7 (1986), *enforced*, 836 F.2d 1381 (D.C. Cir. 1988).

This case is in the same posture. A holding that the Statute does not require an agency to bargain over union-initiated midterm proposals does not imply—much less mean—that midterm bargaining is precluded by the Statute. However, as discussed immediately below, the court of appeals incorrectly went on to find that any union-initiated midterm bargaining is "contrary to the [Statute]." (App., *infra.*, 7a (citing *Energy* v. *FLRA*, 106 F.3d at 1163).)

b. Union-Initiated Midterm Bargaining Is Not Inconsistent with the Statute or Any Other Law or Applicable Regulation

In *Energy* v. *FLRA*, which formed the basis of the court of appeals' decision in the instant case, the court

held that union-initiated midterm bargaining is "contrary to the Statute" and hence a contract provision providing for such bargaining is outside the agency's obligation to bargain. 106 F.3d at 1158-59. The *Energy* v. *FLRA* court found that: 1) its decision in *SSA* v. *FLRA* held not only that midterm bargaining is not mandated by the Statute, but that it is contrary to the Statute; 2) finding midterm bargaining to be negotiable would "effectively vitiate [*SSA* v. *FLRA*]" because in the event of an impasse, the Panel would always impose a clause requiring midterm bargaining; and 3) a proposal is nonnegotiable if it is "at odds with the policies underlying a statute" even if the proposal does not contravene a specific statutory provision. 106 F.3d at 1163-64. The Fourth Circuit is in error on each of these findings. Further, a necessary consequence of the court's conclusion here is that an agency is prohibited from bargaining midterm even if it wishes to do so—an incongruous result.

1. As discussed above, the court erred when it determined that midterm bargaining is not mandated by the Statute. Nonetheless, the panels in *Energy* v. *FLRA* and the instant case have compounded the error by extending *SSA* v. *FLRA* to prohibit negotiating for the right to bargain midterm. Although the *SSA* v. *FLRA* court stated that midterm bargaining was contrary to the Statute, it was not addressing the question of whether midterm bargaining could be negotiable.

The court of appeals' attempts to transform the arguments in *SSA* v. *FLRA* for why the Statute does require midterm bargaining into a rationale for why the Statute prohibits such bargaining conflate a bargaining provision's merits with its negotiability. In *Energy* v. *FLRA* and the instant case, the court found that midterm bargaining is inconsistent with the Statute because it would frustrate the purpose of the Statute to foster stability

and an effective government. As argued above, the Fourth Circuit has exaggerated the extent to which the availability of midterm bargaining would, in fact, frustrate these goals and has ignored other purposes of the Statute which midterm bargaining would further, specifically the protection of the right of employees to bargain collectively and participate through labor organizations in decisions which affect them. 5 U.S.C. 7101(a)(1).

Recognizing the tensions between these twin objectives of the Statute, the Authority has consistently held that proposals which may increase agency costs and disruption, but are not otherwise inconsistent with specific statutory provisions, concern the merits of a proposal, not the proposal's negotiability. *See AFGE, Local 1698 and U.S. Dep't of the Navy, Naval Aviation Supply Office, Philadelphia, Pa.*, 38 FLRA 1016, 1025-26 (1990) (agency's interest in economy to be protected through collective bargaining); *see also Federal Employees Metal Trade Council, AFL-CIO* v. *FLRA*, 778 F.2d 1429, 1432 (9th Cir. 1985) (balancing competing interests of employees and agency is what collective bargaining is intended to do). Deference is due the Authority where it reconciles these competing objectives of the Statute. *See NTEU* v. *FLRA*, 826 F.2d 114, 121 (D.C. Cir. 1987).

2. The court also erroneously determined that permitting unions to negotiate for midterm bargaining would effectively vitiate *SSA* v. *FLRA*. The court reasoned that "because the [Panel] adheres to the position of the Authority that the [agency] has a statutory duty to engage in midterm bargaining," the Panel will always impose a midterm bargaining clause. *Energy* v. *FLRA*, 106 F.3d at 1163-64. Thus, the court concluded that "a union could circumvent [*SSA* v. *FLRA*] by the mere expedient of negotiating to impasse on a midterm bargaining provision." *Id.* at 1164.

First, to the extent the court's speculation as to the future conduct of the Panel is correct, the court's prophesy concerning Panel action will only be accurate so long as a split between the circuits exists. Once the conflict is resolved, the foundation of the court's position evaporates. Obviously, if the position of the Authority and the D.C. Circuit prevails, the question of impasse and Panel involvement effectively becomes moot. But further, even if it is resolved that there is no statutory obligation to bargain midterm, then the Panel could no longer impose such a provision because it is a statutory requirement, but rather would resolve any impasse over midterm bargaining on the merits of the individual case.[8]

Second, and in any event, the court's suggestion that *SSA* v. *FLRA* will be circumvented misperceives the role of the Panel and is belied by Panel practice. The Statute commits to the Panel broad authority to make swift decisions to end disputes where the negotiation process between a federal agency and its employees' collective bargaining agent have failed. *See Council of Prison Locals*, 735 F.2d at 1499. Unlike a court issuing legal determinations, the Panel's resolutions of bargaining impasses do not create binding precedent. Rather, the Panel considers each impasse on its particular facts, and considers the "reasonableness" of the proposals at issue in determining what contract language will be imposed. *National Treasury Employees Union Chapter 83 and Department of the Treasury, Internal Revenue*

---

[8]Of course, if this Court were to find midterm bargaining to be neither a statutory right nor a matter over which an agency must bargain, the Panel could not require an agency to include a provision covering same in a collective bargaining agreement. *See Department of Defense, Office of Dependents Schools* v. *FLRA*, 879 F.2d 1220, 1222 (4th Cir. 1989) (Panel cannot impose terms inconsistent with the Statute or other applicable law or regulation).

Service, 35 FLRA 398, 414 (1990) (citing *Veterans Admin. Medical Center, Tampa, Florida* v. *FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982)).

Contrary to the court of appeals' suggestion, one cannot predict with any degree of certainty what action the Panel will take in a future case. In that regard, the Panel has, in fact, declined to impose midterm bargaining proposals, leaving the parties to address differences over the extent of the relevant statutory rights in other forums. *See Department of Health and Human Servs., Social Security Admin., Office of Hearings and Appeals, Falls Church, Va. and National Treasury Employees Union*, 94 FSIP 47 (Aug. 3, 1994).

3. As relevant here, the obligation to bargain extends to all conditions of employment unless the bargaining proposal is inconsistent with law. The court of appeals has, nonetheless, identified no provision of law which would prohibit an agency from engaging in midterm bargaining. In *Energy* v. *FLRA*, the court found only that midterm bargaining is "at odds with the policies underlying [the Statute]." 106 F.3d at 1164. As noted above, however, the court has selectively emphasized certain policy considerations, *i.e.*, effective and efficient government, while ignoring others.

The court thus requires that this proposal, and presumably all others, be subjected, in isolation, to an effective and efficient government standard. In its most extreme statement, the court finds that midterm bargaining interferes with the public's right to "as effective and efficient a Government as possible." 106 F.3d at 1164 n.9. (quoting *SSA* v. *FLRA*, 956 F.2d at 1288). Taken as a negotiability standard, a proposal would be negotiable only if no other alternative would lead to more efficiency, an obviously implausible standard for negotiability. Strictly applying an efficiency standard

for the negotiability of proposals would tend to diminish meaningful bargaining. Most bargaining proposals require that the agency take some action, or commit resources—oftentimes in a manner that the agency would not have chosen absent the requirements of the proposal. *See National Fed'n of Fed. Employees, Local 2099 and Dep't of the Navy, Naval Plant Representative Office, St. Louis, Mo.*, 35 FLRA 362, 368 (1990) ("To conclude that a proposal or provision [is nonnegotiable] simply because it requires an agency to take some action would completely nullify the obligation to bargain because no obligation of any kind could be placed on management through negotiations").

4. Taken to its logical conclusion, the effect of the court's decision is that midterm bargaining is illegal, *i.e.*, a federal agency is prohibited by law from engaging in union- initiated midterm bargaining. However, in apparent recognition of the extreme nature of this proposition, the court concedes that "an agency might choose to voluntarily enter into midterm bargaining" (App., *infra*, 11a n.2). That is, the court finds that the agency has the discretion to engage in midterm bargaining. But, it is well established that where an agency has discretion under law to act with respect to conditions of employment, it has an obligation to bargain over the exercise of that discretion. *See Department of the Treasury, U.S. Customs Serv.* v. *FLRA*, 836 F.2d 1381, 1384 (D.C. Cir. 1988).

The court's response is that although an agency can choose to bargain midterm, it cannot be required to do so (App., *infra*, 11a n.2). However, the same can be said of any discretionary bargainable matter. Moreover, in none of these cases have the agencies asserted that midterm bargaining falls within the scope of permissible, rather than mandatory, subjects of bargaining. Indeed, this is one of the "quandr[ies]" the court acknowledged to be

created by the current state of affairs (App., *infra*, 11a). It also demonstrates why this conflict needs resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.[9]

Respectfully submitted,

DAVID M. SMITH*
Solicitor

JAMES F. BLANDFORD
Attorney

* Counsel of Record

JANUARY 1998

---

[9]The Solicitor General authorizes the filing of this petition.

APPENDIX A

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.; U.S. GEOLOGICAL SURVEY, Reston, Virginia, *Petitioners*,

v.

FEDERAL LABOR RELATIONS AUTHORITY, *Respondent*,

NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 1309, *Intervenor*.

No. 96-2855

FEDERAL LABOR RELATIONS AUTHORITY, *Petitioner*,

NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 1309, *Intervenor*.

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.; U.S. GEOLOGICAL SURVEY, Reston, Virginia, *Respondents*.

No. 97-1135

On Petition for Review and Cross-application for Enforcement of an Order of the Federal Labor Relations Authority.
(WA-CA-30451)

Argued: October 1, 1997

Decided: October 31, 1997

Before RUSSELL and MOTZ, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Petition for review granted and enforcement denied by published opinion. Senior Judge Phillips wrote the opinion, in which Judge Russell and and Judge Motz joined.

COUNSEL

ARGUED: Sushma Soni, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioners. David Michael Smith, Solicitor, FEDERAL LABOR RELATIONS AUTHORITY, Washington, D.C., for Respondents, Elaine D. Kaplan, NATIONAL TREASURY EMPLOYEES UNION, Washington, D.C., for Intervenor. ON BRIEF: Frank W. Hunger, Assistant Attorney General, John F. Daly, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Petitioners. James F. Blandford, FEDERAL LABOR RELATIONS AUTHORITY, Washington, D.C., for Respondents, Gregory O'Duden, General Counsel, NATIONAL TREASURY EMPLOYEES UNION, Washington, D.C.; Alice Bodley, BEINS, BODLEY, AXELROD & KRAFT, Washington, D.C., for Intervenor.

OPINION

PHILLIPS, Senior Circuit Judge:

The U.S. Geological Survey, of the Department of the Interior, ("Survey") petitions for review of a Federal Labor Relations Authority ("Authority") order finding that the Survey committed an unfair labor practice in violation of the Federal Service Labor-Management Relations Act, 5 U.S.C. § 7116(a)(1) and (5) (1994). The Authority, joined by the National Federation of Federal

Employees Local 1309 ("the Union") as intervenor, cross-petitions for enforcement of its order which had found a violation in the Survey's refusal to negotiate over a union-initiated proposal to include in a collective bargaining agreement a requirement that it bargain over union-initiated midterm proposals. We agree, based upon clear circuit precedent, with the Survey, and deny enforcement.

I.

The Federal Service Labor-Management Relations Act ("Labor Act" or "FSLMRA"), 5 U.S.C.A. § 7101 *et seq.* (West Supp. 1997), establishes a comprehensive federal regulatory scheme for collective bargaining between federal employers and their employees. The Labor Act recognizes the right of federal employees to collectively organize, certify exclusive representatives, and be bargained with in good faith. *See* § 7114(a)(1), 7116. The Labor Act affirmatively requires federal employers to negotiate in good faith and failure to do so is an unfair labor practice. *See* § 7116(a)(5). Federal employees are prohibited by the Act from striking and comparable actions, § 7116(b)(7), their recourse being by action charging unfair labor practices brought against the Authority. *See* §§ 7105(a)(2)(G) & 7118(a)(6). The duty to bargain in good faith does not, however, extend to matters "inconsistent with any Federal law or any Government-wide rule or regulation." § 7117(a)(1).

Where both parties negotiate in good faith but fail to reach an agreement, either party may refer the dispute to the Federal Services Impasses Panel ("FSIP" or "Impasses Panel") *See* § 7119(b)(1). The FSIP is a division of the Authority and "[i]f the parties do not arrive at a settlement after assistance by the Panel . . . the Panel may . . . take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse." § 7119(c)-

(5)(B)(iii). The Panel's binding arbitration authority extends to any negotiable proposal. *See Social Security Administration* v. *FLRA*, 956 F.2d 1280, 1282 (4th Cir. 1992). Though agency heads have the authority to disapprove a provision, disapproval is subject to judicial modification and can constitute an unfair labor practice. *See* §§ 7114(c), 7116(a)(6), 7118.

II.

The facts of this proceeding are straightforward and not in dispute. During a regular collective bargaining process between the Union and the Survey, the Union proposed for inclusion in the bargaining agreement the following clause:

> The Union may request and the Employer will be obligated to negotiate on any negotiable matters not covered by the provisions of this agreement.

JA 71.

Relying on our decision in *Social Security Administration* v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) [hereinafter *SSA*], in which we had held that the Labor Act does not by its terms require federal agencies to participate in union initiated midterm bargaining, the Survey declared this proposal nonnegotiable. The Union then filed a complaint with the Authority alleging, *inter alia*, that in declining to negotiate the proposal, the Survey committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1), (5). After waiver of an administrative law judge hearing and stipulation of the facts, the Authority—relying on the D.C. Circuit's opinion in *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C.Cir. 1987)—ordered the Survey to bargain over the proposal.

In rejecting Survey's reliance on *SSA*, the Authority opined that: (1) *SSA* only held that there was no statutory

obligation to bargain midterm and "did not address whether a union could bargain for that right" and (2) in following longstanding principles of the agency, it was an unfair labor practice for an agency to refuse to bargain over a proposal that is "substantially identical" to one previously found negotiable. *See* JA 74 (citing *U.S. Department of Energy*, 51 FLRA 124 (1995)).

The Survey continues to rely on *SSA* and cites our recent decision in *United States Dept. of Energy* v. *FLRA*, 106 F.3d 1158 (4th Cir. 1997), in support of its refusal to negotiate. Because our decisions in *SSA* and *Energy* control decision here and are dispositive of the issue, we agree with the Survey and deny enforcement.

III.

Underlying the conflicting contentions of the parties in this case is a clear conflict on the issue of union-initiated midterm bargaining proposals between this circuit and the D.C Circuit. The D.C. Circuit's position is that taken in 1985 in *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1985) [hereinafter *NTEU*]. In *NTEU*, the D.C. Circuit refused to enforce the Authority's decision in *Internal Revenue Service* (*IRS I*), 17 FLRA 731, 736 (1985), that there was no obligation to bargain over union-initiated midterm proposals. Rejecting this position, the D.C. Circuit held that the obligation to bargain midterm was firmly established in the private sector and that failure to impose a comparable obligation in the public sector would undermine the "statutory 'goal of equalizing the positions of labor and management at the bargaining table.'" *Id.* at 300 (quoting *American Fed'n of Gov't Employees* v. *FLRA*, 750 F.2d 143, 148 (D.C. Cir. 1984)). On remand, the Authority adopted the D.C. Circuit's position wholesale and concluded that

> the duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved.

Internal Revenue Service (*IRS II*), 29 *FLRA* 162, 166 (1987).

Some five years later, this court held to the contrary in *SSA*. Judge Wilkinson's opinion for the *SSA* court concluded that the Authority's mandatory position on midterm bargaining was at odds with the Labor Act. Relying on the statutory language and legislative history, the *SSA* court held that mandatory midterm bargaining would "contravene many of the basic purposes" of the Labor Act (*id.* at 1288) and as a result the Authority's position was "not in accordance with law." *Id.* at 1290 (quoting 5 U.S.C. §§ 706(2)(A), 7123(c)).

The Authority later had an opportunity to evaluate the reach of *SSA* in *Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995). In *Energy*, the affected agency had disapproved a bargaining agreement clause imposed by the Impasse Panel that would have required it to bargain in good faith on union-initiated midterm proposals.[1] In finding the agency disapproval an unfair labor practice,

---

[1]The clause mandated by the Panel provided:

> The Employer will be obligated to bargain in good faith on any negotiable Union-initiated proposals concerning matters that are not contained in or covered by the collective bargaining agreement, unless the union has waived its rights to bargain about the subject matter involved.

United States Dept. of Energy v. *FLRA*, 106 F.3d 1158, 1161 (4th Cir. 1997).

the Authority distinguished *SSA* because there "the Fourth Circuit did not address the negotiability of a provision for union-initiated midterm bargaining; the court addressed only whether, apart from any contractual obligations, an agency is required under the Statute to engage in such bargaining." *Id.* at 127. Because a midterm bargaining provision was negotiable and consistent with the law, disapproval of the provision imposed by the Panel violated §§ 7116(a)(1) and (a)(6). *Id.*

An enforcement petition then filed in *Energy* provided this circuit with the opportunity to pass on the Authority's attempt to distinguish SSA. In *United States Department of Energy* v. *Federal Labor Relations Authority*, 106 F.3d 1158 (4th Cir. 1997), we refused to enforce the Authority's order and flatly rejected its position that *SSA* did not control. While agreeing "that the question of whether the FSLMRA imposes a statutory duty differs from the question of whether an agency must negotiate with a union regarding the inclusion of a clause in a collective bargaining agreement," we found the distinction "more apparent than real." *Id.* at 1163. "[N]ot only is union–initiated midterm bargaining not mandated by the FSLMRA, but [it is] also . . . *contrary* to the FSLMRA." *Id.* (citation omitted) (emphasis in original). The *Energy* court explicitly found such proposals nonnegotiable, reasoning that if this type of provision were negotiable it "would effectively vitiate *SSA*." *Id.* According to the court:

> Because the Impasses Panel adheres to the position of the Authority that the Department has a statutory duty to engage in midterm bargaining, we cannot envision a case in which the Impasses Panel would fail to impose upon an agency a midterm bargaining clause like the one before us. . . . Thus, a union could circumvent *SSA* by the mere expedient of negotiating to impasse on a midterm bargaining provision, essen-

> tially requiring an agency to bargain midterm over union proposals despite our determination that such a requirement is contrary to FSLMRA.

Id. at 1163-64.

IV.

This case now requires us to assess whether *SSA* and *Energy* similarly require rejection of the Authority's position that it may order an agency to negotiate over whether it will negotiate over union-initiated midterm proposals.

A.

The first question is the deference we owe to the Authority's formal position. The basic principle of course is that an agency ruling may be set aside only if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 7123(c). Where the agency ruling is based upon application of a governing statute and "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (footnote omitted). Here, however, we deal not with the Agency's interpretation of a statutory provision not previously interpreted by this court, but with its interpretation of our prior interpretation of the relevant statutory provisions. In such a situation, "[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Neal* v. *United States*, 116 S. Ct. 763, 768-69 (1996)(citations omitted).

B.

Confronted with this principle governing our judicial review, the Authority seeks to distinguish the issue we decided, as a matter of statutory interpretation, in *Energy* from that presented here, hence to persuade us that our interpretation in *Energy* does not bind us here as a matter of *stare decisis*. Alternatively, it contends that the reasoning in *Energy* that may seem to reach the issue here is *dicta* and so should not be thought to bind us. We disagree on both points.

The Authority argues that the procedural posture of *Energy* distinguishes the statutory interpretation issue there from that confronted here. "[U]nlike the case in *Energy* v. *FLRA*, where the obligation to bargain midterm was imposed on the agency, here the Authority has only ordered the Survey to bargain over whether it will entertain union-initiated proposals during the term of the agreement." Respondent's brief at 11. The Authority's argument is, in short, that while *Energy* involved an Impasses Panel-imposed requirement to bargain midterm, this case involves a requirement to bargain about whether an agency will bargain, and that the distinction is critical in freeing us from our holding in *Energy*.

There is indeed a distinction, but it is not critical. The same practical consequences flowing from the impasse procedures that made the distinction between a statutory requirement and general duty to bargain of no consequence in *Energy* obtain here. As in *Energy*, if we adopted the Authority's position, a "union could circumvent *SSA* by the mere expedient of negotiating to impasse on a midterm bargaining provision" only to have the Impasses Panel mandate the inclusion of such a provision through its binding arbitration authority. *Energy*, 106 F.3d at 1164. Though an additional-step in the analysis is necessary, there is no conceivable reason why a duty to bargain is dif-

ferent for the purpose at hand from a duty to bargain about whether to bargain. The overriding principle in this circuit remains the same: an agency may not be *required* to negotiate midterm. While agencies are free to negotiate midterm if they so choose, requiring an agency to negotiate midterm is "inconsistent with the FSLMRA and, consequently, is not negotiable." *Id.* at 1163. We therefore reject the Authority's attempt to distinguish this case from *Energy* in the critical respect sought.

Recognizing the conceptual hurdle erected by *Energy's* discussion of the Impasses Panel processes, the Authority contends that this reasoning was *dicta*. The argument is that the court in *Energy* went outside the facts before it, misconstrued the basic role of the Impasses Panel, and made a determination that does not accurately reflect the experiences of the Panel or the Authority. It is not certain, according to the Authority, that an Impasses Panel will always impose a midterm bargaining, requirement whenever a midterm proposal is made. In fact, on at least one occasion the Impasses Panel has chosen not to impose one. *See Department of Health and Human Services*, 94 Fed. Serv. Imp. Pan. 47 (Aug. 3, 1994). Moreover, if impasse results and the Panel imposes a requirement to negotiate a union's proposal, "the agency head may rely upon this [c]ourt's *Energy* v. *FLRA* decision to guide his or her actions." Respondent's brief at 19 (footnote omitted).

The Authority's arguments misconstrue the regulatory implications of an agency head's failure to follow an Impasses Panel mandate and disregard the explicit holding in *Energy*. Failure to abide by the binding arbitration authority of the Panel is an unfair labor practice within the meaning of § 7116(a)(6). *See id.* ("For the purpose of this chapter, it shall be an unfair labor practice for an agency—(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter.").

If an agency head does disapprove a requirement to negotiate (or alternatively to negotiate about whether to negotiate) the agency's refusal to adhere to the Panel's resolution would not be a viable alternative because such an action could easily be considered an unfair labor practice.

Attempts to characterize *Energy's* discussion of the Impasses Panel processes as *dicta* are also unpersuasive as a technical matter. *Energy's* description and understanding of the Impasse Panel's role were central to the court's disposition. Without this reasoning the court would have been unable to dismiss (as "more apparent than real") the distinction between a statutory duty to negotiate and a Panel-imposed obligation to negotiate. *See Energy*, 106 F.3d at 1163. Dependence upon this reasoning could not have been more clearly expressed: "a clause requiring an agency to engage in union-initiated midterm bargaining is inconsistent with the FSLMRA and, consequently, is not negotiable." *Id.*

In its efforts to deal with our *Energy* decision, the Authority advances several policy arguments[2] and complains of the quandary the conflicting holdings of the Fourth and D.C. Circuits create. While we realize the difficulties which the conflicting decisions present, we can only note the obvious: that recourse for resolution must be sought elsewhere.

---

[2]The Authority argues that even if the Impasses Panel cannot impose a requirement to bargain there is much benefit from an agency negotiating over whether to negotiate. "Upon resumption of bargaining, the agency may continue the proposal, seek modification of the proposal, or bargain for union concessions in agreeing to the proposal." Respondent's brief at 18. We agree that there may be times when an agency might choose to voluntarily enter into midterm bargaining. We hold only that they may not be required to do so.

V.

In light of our decisions in *Energy* and *SSA*, we grant the petition for review and deny enforcement of the Authority's decision.

SO ORDERED

APPENDIX B

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE INTERIOR
WASHINGTON, D.C.
AND
U.S. GEOLOGICAL SURVEY
RESTON, VIRGINIA
(Respondents)

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES LOCAL 1309
(Charging Party/Union)

WA-CA-30451

DECISION AND ORDER

October 24, 1996

Before the Authority: Phyllis N. Segal, Chair; Tony Armendariz and Donald S. Wasserman, Members.

I. *Statement of the Case*

This unfair labor practice case is before the Authority in accordance with section 2429.1(a) of the Authority's Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The General Counsel, the Charging Party and the Respondents filed briefs.

The amended complaint alleges the following: (1) the U.S. Geological Survey (Survey) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to bargain over a proposal authorizing midterm bargaining that is substantially identical to proposals previously found negotiable by the Authority; and (2) the Department of the Interior (Interior) violated section 7116(a)(1) of the Statute by interfering with the bargaining relationship between Survey and the Charging Party. More particularly, the amended complaint states that Survey's refusal to bargain was based on advice received from Interior that the proposal was nonnegotiable and that there was no obligation to bargain.[1]

For the reasons that follow, we conclude that Survey violated the Statute, as alleged, and we order it to bargain on request of the Charging Party. We also find that Interior did not violate the Statute and we dismiss the allegation of the amended complaint as to this party.

II. *Background and Stipulation*

The Charging Party and Survey were engaged in term negotiations for a successor agreement during which the Charging Party offered the following proposal:

> Article 7. Section 2.b. Union-initiated Bargaining. The Union may request and the Employer will be obliged to negotiate on any negotiable matters not covered by the provisions of this agreement.

---

[1]The General Counsel withdrew allegations of the amended complaint regarding a second proposal submitted by the Charging Party and an allegation that Interior violated section 7116(a)(5) of the Statute. General Counsel's Brief at 1-2. These matters are not before the Authority and we do not address them further.

Stipulation, Exhibit 2 at 1.

Survey sought advice from Interior as to the negotiability of the proposal. Interior advised that the proposal was not within the duty to bargain based on the decision in *Social Security Administration* v. *FLRA*, 956 F.2d 1280 (4th Cir. 1992) (*SSA* v. *FLRA*). After the Charging Party again requested bargaining, Survey told the Charging Party that the proposal was not within the duty to bargain and that it would not bargain. Survey took this position based on the decision in *SSA* v. *FLRA* and "information" from Interior. Stipulation, para. 13.

Survey and the Charging Party subsequently executed a collective bargaining agreement. Referring to the Union's bargaining proposal, the agreement included the following language that was offered by Survey and agreed to by the Charging Party:

> The Parties have not agreed to this provision. The Union has filed a ULP. Pending resolution of the ULP, if the provision is declared negotiable, the Parties agree to get together and bargain in good faith to closure, including impasse, if necessary. If the provision is declared non-negotiable, it will be declared null and void.

Stipulation, para. 18. Interior thereafter reviewed the collective bargaining agreement pursuant to section 7114(c) of the Statute and disapproved it.[2]

III. *Positions of the Parties*

A. *General Counsel*

The General Counsel contends that it is an unfair labor practice to refuse to bargain over a proposal that is sub-

---

[2]The amended complaint does not allege a violation based on the disapproval.

stantially identical to one previously found negotiable by the Authority. According to the General Counsel, the Charging Party's proposal is substantially identical to one found negotiable in *Merit Systems Protection Board Professional Association and Merit Systems Protection Board, Washington. D.C.*, 30 FLRA 852 (1988) (*MSPB*).

The General Counsel also claims that Interior unlawfully interfered with the bargaining relationship of the Charging Party and Survey. In support, the General Counsel cites *U.S. Department of Defense, National Guard Bureau, Alexandria, Virginia*, 47 FLRA 1213 (1993) (*National Guard Bureau*).

To remedy the alleged unfair labor practices, the General Counsel requests that the Authority issue an order that would require Survey "to bargain over the [Charging Party's] proposal and apply the results of that bargaining retroactively to the date their successor agreement became effective, if that occurred before the completion of bargaining pursuant to the order." General Counsel's Brief at 5.

B. *Charging Party*

The Charging Party cites various Authority decisions and the court's decision in *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295 (D.C. Cir. 1987) (*NTEU* v. *FLRA*), in support of its argument that there is an obligation to bargain over union-initiated proposals during the term of a collective bargaining agreement. The Charging Party also points out that the Authority has refused to follow *SSA* v. *FLRA*, adhering instead to *NTEU* v. *FLRA*. Finally, the Charging Party argues that the conduct of Interior in interfering with the negotiations between Survey and the Charging Party violated the Statute.

C. *Respondents*

The Respondents maintain that there is no obligation to bargain over union-initiated midterm proposals. According to the Respondents, the Authority should adhere to the position it took in *Internal Revenue Service*, 17 FLRA 731 (1985) (*IRS I*),[3] as well as the decisions of the United States Court of Appeals for the Fourth Circuit, in which Survey is located. The Respondents cite *SSA* v. *FLRA* and *Patent and Trademark Office* v. *FLRA*, 991 F.2d 790 (4th Cir. 1993) (unpublished), in support of their argument that the Charging Party's proposal requiring midterm bargaining on union-initiated proposals is outside the duty to bargain.

The Respondents further assert that the decision in *Department of the Navy, Marine Corps Logistics Base, Albany, Georgia* v. *FLRA*, 962 F.2d 48 (D. C. Cir. 1992) (*Department of the Navy*), demonstrates the D.C. Circuit's endorsement of the "underlying policy rationale" of *SSA* v. *FLRA*. Respondents' Brief at 18. According to the Respondents, "the D.C. Circuit interpreted the fundamental policy of the Statute as essentially limiting the agency's duty to bargain over union-initiated midterm bargaining proposals as did the Fourth Circuit and the Authority in *IRS I*." *Id.* at 22. The Respondents request the Authority to reconsider and reverse its decision in *IRS II* or find that it is not applicable in this case.

Finally, the Respondents take the position that the stipulation contains no facts to support the allegation that Interior directed Survey in any way or otherwise inter-

---

[3]The Authority's decision in *IRS I* was reversed in *NTEU* v. *FLRA*, 810 F. 2d 295. Subsequently, the Authority issued a decision on remand, *Internal Revenue Service*, 29 FLRA 162 (1987) (*IRS II*), in which it adopted the court's decision holding that the Statute authorizes union-initiated midterm bargaining.

fered with the bargaining relationship of Survey and the Charging Party. The Respondents contend that Survey "sought advice from" Interior and "independently decided to follow this advice" when it informed the Charging Party that the proposal was nonnegotiable. *Id.* at 24.

IV. *Analysis and Conclusion.*

A. *The Basis of an Unfair Labor Practice in This Case*

It is an unfair labor practice for an agency to refuse to bargain over a proposal that is substantially identical to one previously found negotiable by the Authority. *E.g., U.S. Department of Health and Human Services, Public Health Service and Centers for Disease Control, et al,* 39 FLRA 1306, 1311 (1991) (PHS). A respondent acts at its peril in such cases "without regard to whether [the] respondent raises 'new' or 'old' arguments" and will be found to have violated the Statute as long as the proposal is within the duty to bargain. *National Guard Bureau,* 47 FLRA at 1218 (quoting *U.S. Department of the Army, Fort Stewart Schools, Fort Stewart, Georgia,* 37 FLRA 409, 420 (1990) (*Fort Stewart*).

1. *The Charging Party's Proposal Is Substantially Identical to a Proposal That the Authority Previously Found Negotiable*

As the General Counsel correctly states, the Authority previously found negotiable a proposal authorizing union-initiated midterm bargaining. In *MSPB,* the union proposed that "the parties may engage in midterm bargaining and bargain supplemental chapter agreements, on matters not addressed in the National Agreement." 30 FLRA at 859. The Authority determined that the proposal was within the duty to bargain. In reaching that result, the Authority rejected the agency's sole contention that there was no duty to bargain over proposals initiated

by the Union during the term of the negotiated agreement. Citing *IRS II*, 29 FLRA 162, the Authority determined that the proposal at issue was negotiable because it reiterated a right the Union had under the Statute.

Both this proposal and the proposal in *MSPB* authorize union-initiated bargaining during the term of a collective bargaining agreement. No substantive differences are apparent between the proposals and the Respondents make no such claim. Therefore, we find that the Charging Party's proposal is substantially identical to the proposal in *MSPB*.

2. *Proposals Authorizing Union-Initiated Midterm Bargaining Are Within the Duty to Bargain Under the Statute*

In addition to the fact that the proposal is substantially identical to a proposal previously found negotiable, there is otherwise nothing in the record of this case that persuades us that the Charging Party's proposal should be found to be outside the duty to bargain. In particular, we reject the Respondents' assertions that the Authority follow its decision in *IRS I* or find that the decision in *IRS II* is not applicable here. The Authority adheres to its position with regard to bargaining over union-initiated proposals during the term of an agreement. *See e.g., Department of Health and Human Services, Social Security Administration*, 47 FLRA 1206 (1993); *U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri*, 31 FLRA 1231 (1988). The Respondents' reliance on *SSA* v. *FLRA* and their assertions regarding *Department of the Navy* do not warrant a departure from that position.

In *SSA* v. *FLRA*, the U.S. Court of Appeals for the Fourth Circuit held, as relevant here, that the Statute

does not require bargaining on union-initiated matters during the term of a collective bargaining agreement. More recently, in *U.S. Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995), *petition for review filed*, No. 95-2949 (4th Cir. Nov. 6, 1995), the Authority addressed the effect of the court's decision on the negotiability of a proposal seeking to authorize union-initiated midterm bargaining. The Authority determined that a provision authorizing union-initiated midterm bargaining during the term of an agreement was within the duty to bargain. In reaching that result, the Authority stated that the Fourth Circuit in *SSA* v. *FLRA* "did not address the *negotiability* of a provision for union-initiated midterm bargaining; the court addressed only whether, apart from any contractual obligation, an agency is required under the Statute to engage in such bargaining." 51 FLRA at 127 (footnote omitted). Noting that it has declined to follow *SSA* v. *FLRA*, the Authority stated that even if it were to agree with that decision, the outcome would remain the same because the Authority "has previously upheld the negotiability of proposals despite the absence of a statutory right concerning the matter in question." 51 FLRA at 127 n.4. Similarly, we find nothing in *SSA* v. *FLRA* that compels the conclusion that the Charging Party's proposal in this case is outside the duty to bargain. *See also American Federation of Government Employees, Local 1995 and U.S. Department of Energy, Morgantown Energy Technology Center, Morgantown, West Virginia*, 47 FLRA 470 (1993) (Authority found negotiable a proposal containing a reopener clause and, in so doing, rejected the claimed applicability of *SSA* v. *FLRA*).

We also find nothing in *Department of the Navy* that compels a finding that there is no obligation to bargain over the proposal. In that case, the U.S. Court of Appeals for the District of Columbia Circuit addressed whether

there was an obligation to bargain over matters that are covered by or contained in existing collective bargaining agreements, not whether there is a duty to bargain over union-initiated midterm bargaining. That is, the court addressed the parameters of the duty to engage in midterm bargaining, not whether there is such a duty to bargain in the first place. While the court discussed the need to provide parties with "stability and repose" with respect to matters reduced to writing, that finding was tied to the policies regarding the duty to bargain over matters that are contained in or covered by collective bargaining agreements. 962 F.2d at 59. The Authority has since modified that policy. *See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993).

In sum, we find that the Charging Party's proposal is: (1) substantially identical to a proposal that the Authority previously found was negotiable; and (2) is otherwise within the duty to bargain. In reaching this result, we make no judgment as to the merits of the proposal .

B. *Survey Violated the Statute: Interior Did Not Violate the Statute*

The Authority previously has held that when higher-level management within a chain of command directs management at a subordinate level in that same chain of command to act in a manner that is inconsistent with the subordinate level's bargaining obligations under the Statute, the higher level violates section 7116(a)(1) and (5) of the Statute. *Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 46 FLRA 1184, 1186 (1993) (*AFLC*). Conversely, if the party at the level of exclusive recognition is prevented from bargaining based on direction from higher level management, no violation is found against the party that is merely complying with

higher-level direction and whose actions are ministerial in nature. *PHS*, 39 FLRA at 1315.

In this case, the record clearly establishes that Survey refused to bargain over a proposal that is substantially identical to a proposal that the Authority had previously determined was within the duty to bargain. *See* § IV.A, *supra*. Although the record discloses that Survey sought advice from Interior prior to informing the Charging Party of its position, there is no evidence that Interior directed Survey to refuse to bargain. Further, there is no evidence that Survey was prevented from bargaining by the actions or conduct of Interior. Indeed, the Respondents maintain, in their post-stipulation brief, that Survey acted independently in following the advice offered by Interior. Accordingly, we conclude that Survey violated section 7116(a)(1) and (5) of the Statute by refusing to bargain over the Charging Party's proposal.

We further find that Interior did not interfere with the bargaining relationship between Survey and the Charging Party. In the circumstances of this case, the fact that Interior provided advice to Survey does not establish that Interior directed Survey to act in a particular manner or to refrain from taking any action in fulfillment of its bargaining obligation. *See Kansas Army National Guard and National Guard Bureau*, 10 FLRA 303, 306 (1982) (finding no violation against a higher-level entity in the chain of command for "*advising* the [lower level entity] to take the course of action which it did as opposed to *directing* the latter to take such action") (emphasis in original). *See also PHS*, 39 FLRA at 1314 (more than mere reference to the existence of policy by an agency is necessary to establish that an agency has unlawfully interfered with the collective bargaining relationship between its subordinate activities and the exclusive representative).

We also find that this case is distinguishable from situations in which higher-level management prohibited a subordinate level from bargaining, *see AFLC*, 46 FLRA at 1186, or in some other manner prevented a subordinate from fulfilling its statutory obligations. *See Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Illinois*, 44 FLRA 117, 125-26 (1992) (Member Armendariz dissenting), *petition for review denied sub nom. Headquarters, U.S. Air Force, Washington, D.C.* v. *FLRA*, 10 F. 3d 13 (D.C. Cir. 1993) (without opinion).

Finally, the record does not support the General Counsel's assertion that Interior's conduct is essentially identical to conduct that was found to be unlawful in *National Guard Bureau*, 47 FLRA 1213. In that case, there is no evidence that management at the level of exclusive recognition acted independently in declaring nonnegotiable a union proposal. In contrast, the Respondents acknowledge in this case that Survey "independently decided to follow" Interior's advice. Respondents' Brief at 24.

In sum, we conclude that Survey violated section 7116(a)(1) and (5) of the Statute. Interior did not violate the Statute, as alleged.

C. *A Bargaining Order Is an Appropriate Remedy*

In prior Authority decisions involving an unlawful refusal to bargain over a proposal substantially identical to one previously found negotiable, the Authority has ordered the parties, on request of the union involved, to bargain over the proposal and to give such bargaining retroactive effect. *E.g.*, *National Guard Bureau*, 47 FLRA at 1220; *Fort Stewart*, 37 FLRA at 422. In these cases, no reason was argued or apparent for not providing such a remedy. More particularly, there was no evidence

that the parties would be unable to implement retroactively any agreement reached.

In this case, however, we find that such a remedy is not appropriate. The General Counsel has not identified, and it is not otherwise clear to us, how the requested remedy is capable of implementation. The proposal at issue authorizes union-initiated midterm bargaining. By its very nature, its application has a prospective effect in that it addresses the bargaining relationship that the parties will have in the future. Given the nature of this proposal, we find that an order to bargain over the proposal, on request of the Charging Party, is appropriate and will effectuate the purposes and policies of the Statute. *E.g., Department of the Air Force, U.S. Air Force Academy*, 6 FLRA 548 (1981), *aff'd*, 717 F.2d 1314 (10th Cir. 1983).

V. *Order*

Pursuant to section 2423.29 of the Authority's Regulations and section 7118 of the Federal Service-Labor Management Relations Statute, the U.S. Geological Survey, Reston, Virginia, shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate with the National Federation of Federal Employees, Local 1309, the employees' exclusive bargaining representative, over a proposal authorizing union-initiated midterm bargaining that is substantially identical to a proposal previously found negotiable by the Authority.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain in good faith with the National Federation of Federal Employees, Local 1309, over the proposal authorizing union-initiated midterm bargaining.

(b) Post at its facilities copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the head of the U.S. Geological Survey, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Regulations, notify the Regional Director, Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this order, as to what steps have been taken to comply.

All allegations in the amended complaint pertaining to the U.S. Department of the Interior, Washington, D.C. are dismissed.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Geological Survey, Reston, Virginia, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by the Notice:

We hereby notify bargaining unit employees that:

WE WILL NOT refuse to negotiate with the National Federation of Federal Employees, Local 1309, the employees' exclusive bargaining representative, over a proposal authorizing union-initiated midterm bargaining that is substantially identical to a proposal previously found negotiable by the Authority.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Federal Service Labor Management Relations Statute.

WE WILL, upon request, bargain in good faith with the National Federation of Federal Employees, Local 1309, over the proposal authorizing union-initiated midterm bargaining.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Washington Regional Office, whose address is: 1255 22nd Street, N.W., 4th Floor, Washington, D.C. 20037, and whose telephone number is: (202) 653-8500.

APPENDIX C

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996)

§ 7101. Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be

interpreted in a manner consistent with the requirement of an effective and efficient Government.

§ 7103. Definitions; application

(a) For the purpose of this chapter—

* * * * *

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

* * * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this

chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

* * * * *

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all

employees in the unit it represents without discrimination and without regard to labor organization membership.

* * * * *

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

* * * * *

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

* * * * *

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

* * * * *

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

* * * * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

* * * * *

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

* * * * *

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what matter it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasses, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the

President, solely on the basis of fitness to perform duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

* * * * *

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the

court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.